



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2023-0179; FRL-10883-02-R3]

West Virginia; Finding of Failure to Submit State Implementation Plan Revision in Response to the 2015 Findings of Substantial Inadequacy and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final action.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to find that the West Virginia Department of Environmental Protection (WVDEP) failed to timely submit a state implementation plan (SIP) revision required by the Clean Air Act (CAA) to address the deficiencies identified in EPA’s 2015 findings of substantial inadequacy and “SIP calls” for provisions applying to excess emissions during periods of startup, shutdown, and malfunction (SSM). EPA is issuing this finding of failure to submit (FFS) without prior public notice and opportunity for comment. This action triggers certain CAA deadlines for EPA to impose sanctions if a state does not submit a complete SIP revision addressing the outstanding requirements and to promulgate a Federal Implementation Plan (FIP) if EPA does not approve the state’s submission as a SIP revision. In a separate but related action, published elsewhere in this issue of the Federal Register, EPA is also issuing a final disapproval of a SIP revision submitted by West Virginia which allowed sources who could not meet emission limits during startup and shutdown events to apply for alternative emission limits (AELs) (*see* Docket ID No. EPA-R03-OAR-2022-0956).

DATES: This action is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2023-0179. All documents in the docket are listed on the www.regulations.gov website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through www.regulations.gov, or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Serena Nichols, Planning and Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1600 John F. Kennedy Boulevard, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814-2053. Ms. Nichols can also be reached via electronic mail at Nichols.Serena@epa.gov.

SUPPLEMENTARY INFORMATION:

A. Notice and Comment under the Administrative Procedure Act (APA)

Section 553(b)(3)(B) of the APA, 5 U.S.C. 553(b)(3)(B), provides that, when an agency for good cause finds that notice and public procedures are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for making this final agency action without prior proposal and opportunity for comment because no significant EPA judgment is involved in making findings of failure to submit SIPs, or elements of SIPs, required by the CAA, where states have made no submissions to meet the requirement. As is discussed in further detail later, pursuant to CAA section 110(k)(1)(B), EPA “shall determine” no later than six months after the date by which a state is required to submit a SIP whether a state has made a submission that meets the minimum completeness criteria established pursuant to CAA section 110(k)(1)(A). EPA exercises no significant judgment in making a determination

that a state failed to make a submission and subsequently issuing a finding of failure to submit. Thus, notice and public procedures are unnecessary to take this action. EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(3)(B).

I. Background

On June 12, 2015, EPA finalized an action (2015 SSM SIP Action), which clarified, restated, and updated EPA's national policy regarding SSM provisions in SIPs (2015 Policy).¹ The 2015 Policy explained EPA's interpretation of certain CAA requirements, affirming that SSM exemption provisions (*e.g.*, automatic exemptions, discretionary exemptions, and overly broad enforcement discretion provisions) and affirmative defense SIP provisions are generally viewed as inconsistent with CAA requirements. At the same time, pursuant to CAA section 110(k)(5), EPA issued findings of substantial inadequacy for SIP provisions applying to excess emissions during SSM periods for 36 states that were applicable in 45 statewide and local jurisdictions (air agencies).² As part of the 2015 SSM SIP Action, EPA also issued a "SIP call" (2015 SIP Call) to each of those 45 air agencies. The 2015 SIP Call required air agencies to adopt and submit revisions to EPA to correct identified SSM-related deficiencies in their SIPs by November 22, 2016. The 2015 SSM SIP Action also responded to a petition for rulemaking alleging specific deficiencies related to SSM provisions in existing SIPs. On July 27, 2015, the 2015 SSM SIP Action was challenged in the United States Court of Appeals for the District of Columbia Circuit.³

In 2017, EPA requested that the pending litigation on the final 2015 SSM SIP Action be held in abeyance to allow the new administration time to review the action. In 2020, Regions 4, 6, and 7 took final actions that were inconsistent with the 2015 Policy and EPA withdrew the

¹ State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction, 80 FR 33840 (June 12, 2015).

² For convenience, the EPA refers to "air agencies" in this action collectively when meaning to refer in general to states, the District of Columbia, and local air permitting authorities that are currently administering, or may in the future administer, EPA-approved implementation plans.

³ *Environ. Comm. Fl. Elec. Power v. EPA, et al*, No. 15-1239 (D.C. Cir.) (and consolidated cases).

corresponding SIP calls previously issued to Texas, North Carolina, and Iowa. These state-specific actions are the subject of pending litigation.⁴ Moreover, in alignment with the SIP call withdrawals for Texas, North Carolina, and Iowa, EPA issued a Memorandum in October 2020 (2020 Memorandum), which established a new national policy that permitted the inclusion of certain provisions governing SSM periods in SIPs, including those related to exemptions and affirmative defenses. Importantly, the 2020 Memorandum was not a regulatory action and did not alter or withdraw the 2015 SIP Call for any of the 45 air agencies identified in the 2015 SSM SIP Action. The 2020 Memorandum did, however, indicate EPA’s intent at the time to review the remaining SIP calls that were issued in the 2015 SSM SIP Action to determine whether EPA should maintain, modify, or withdraw particular SIP calls through future agency actions.

On September 30, 2021, EPA issued a Memorandum (2021 Memorandum) that announced a withdrawal of the 2020 Memorandum and EPA’s intent to return to the 2015 Policy and implement it fully. As previously articulated in the 2015 Policy, the 2021 Memorandum states that SSM exemption provisions and affirmative defense provisions included in SIPs will generally be viewed as inconsistent with CAA requirements.

As part of the reinstatement of the 2015 Policy, EPA intends to implement the pending SIP calls, which remain in place from the 2015 SSM SIP Action. Pursuant to CAA section 110(k)(1)(B), EPA must determine no later than six months after the date by which a state is required to submit a SIP whether a state has made a submission that meets the minimum completeness criteria established pursuant to CAA section 110(k)(1)(A). These criteria are set forth at 40 CFR part 51, appendix V. EPA refers to the determination that a state has not submitted a SIP submission that meets the minimum completeness criteria, or has not submitted a SIP at all, as a “finding of failure to submit.”

⁴ *Sierra Club, et al v. EPA, et al*, No. 20-1115 (D.C. Cir. Apr. 7, 2020); *Sierra Club, et al v. EPA, et al*, No. 20-1229 (D.C. Cir. June 29, 2020); *Sierra Club, et al v. EPA, et al*, No. 21-1022 (D.C. Cir. January 2021).

For the 2015 SIP Call, as previously discussed, SIP submissions were due by November 22, 2016. EPA's determinations of whether air agencies made submittals were therefore due on May 22, 2017. West Virginia submitted a SIP revision to EPA on June 13, 2017, which became complete by operation of law on December 13, 2017. The June 13, 2017 SIP revision asked EPA to approve into the SIP new West Virginia regulations allowing sources that could not meet their emission limits during periods of startup or shutdown to apply for AELs during these periods of startup and/or shutdown. These new West Virginia regulations also prohibited sources which were subject to Federal new source performance standards (NSPS) or national emission standards for hazardous air pollutants (NESHAPS) from applying for AELs if the applicable NSPS or NESHAP had emission limits or provisions covering startup or shutdown. In a separate rulemaking action, EPA is taking final action to disapprove West Virginia's June 13, 2017 SIP revision published elsewhere in the "Rules" section of this issue of the Federal Register (*see* Docket ID No. EPA-R03-OAR-2022-0956).

EPA originally assumed that WVDEP's June 13, 2017 submittal was intended as a response to the 2015 SIP Call. However, WVDEP submitted comments in response to EPA's December 22, 2022 notice of proposed rulemaking (NPRM)⁵ indicating that the 2017 SIP submittal was not intended to address the provisions identified in EPA's 2015 SSM SIP Action and that West Virginia would submit future SIP revisions to address the provisions identified in the 2015 SSM SIP Action.⁶ However, West Virginia has not submitted those future SIP revisions addressing the 2015 SSM SIP Action. This clarification means that WVDEP has not submitted the required SIP revisions responding to the 2015 SIP call. Accordingly, EPA is now issuing a finding of failure to submit (FFS).

II. Finding of Failure to Submit

⁵ 87 FR 78617

⁶ See West Virginia's comments in response to the NPRM, located in the docket for the NPRM. Docket ID EPA-R03-OAR-2022-0956

In the 2015 SSM SIP Action, EPA issued a final determination that 14 provisions in the West Virginia SIP were substantially inadequate to meet CAA requirements.⁷ Specifically, the 2015 SSM SIP Action issued a SIP call for the following sections of the West Virginia SIP: W. Va. Code R. 45-2-9.1, W. Va. Code R. 45-7-10.3, W. Va. Code R. 45-40-100.8, W. Va. Code R. 45-2-10.1, W. Va. Code R. 45-3-7.1, W. Va. Code R. 45-5-13.1, W. Va. Code R. 45-6-8.2, W. Va. Code R. 45-7-9.1, W. Va. Code R. 45-10-9.1, W. Va. Code R. 45-21-9.3, W. Va. Code R. 45-3-3.2, W. Va. Code R. 45-7-10.4, W. Va. Code R. 45-2-10.2, and W. Va. Code R. 45-2-9.4.⁸ The rationale underlying EPA's determination that these provisions were substantially inadequate to meet CAA requirements, and therefore to issue a SIP call to West Virginia to remedy the provisions, is detailed in the 2015 SSM SIP Action and the relevant proposals prior to the SIP call and will not be repeated here.

West Virginia's June 13, 2017, SIP submittal did not remove any of these provisions from the West Virginia SIP, and West Virginia did not submit any other SIP revisions subsequent to the June 13, 2017 SIP submittal removing or otherwise addressing any of these West Virginia SIP provisions identified above and in the 2015 SSM SIP Action. As noted above, these revisions were due by May 22, 2017. Therefore, EPA is issuing a finding that West Virginia has failed to submit revisions to the substantially inadequate SIP provisions identified in EPA's 2015 SSM SIP action.

III. Consequences of Findings of Failure to Submit

If EPA finds that a state has failed to make the required SIP submittal or that a submitted SIP is incomplete, then CAA section 179(a) establishes specific consequences, after a period of time, including the imposition of mandatory sanctions under CAA section 179(b) for the affected areas or states. The two applicable sanctions enumerated in CAA section 179(b) are: (1) the 2-to-1 emission offset requirement for all new and modified major sources subject to the

⁷ 80 FR 33840, at 33961, June 12, 2015.

⁸ Id.

nonattainment New Source Review (NSR) program, and (2) restrictions on highway funding. Additionally, a finding that a state has failed to submit a complete SIP triggers an obligation under CAA section 110(c) for EPA to promulgate a FIP no later than two years after issuance of the finding of failure to submit if the affected state has not submitted, and EPA has not approved, the required SIP submittal.

With respect to mandatory sanctions, if EPA has not affirmatively determined that a state has made the required complete SIP submittal within 18 months⁹ of the effective date of this final action, then, pursuant to CAA section 179(a) and (b) and 40 CFR 52.31, the offset sanction identified in CAA section 179(b)(2) will apply in the affected nonattainment area or state. If EPA has not affirmatively determined that the state has made the required complete SIP submittal within six months after the offset sanction is imposed, then the highway funding sanction will apply in the affected nonattainment area(s), in accordance with CAA section 179(b)(1) and 40 CFR 52.31.¹⁰ The sanctions will not take effect if, within 18 months after the effective date of these findings, EPA affirmatively determines that the state has made a complete SIP submittal addressing the deficiency for which the finding was made. Additionally, if the state makes the required SIP submittal and EPA takes final action to approve the submittal within two years of the effective date of these findings, EPA is not required to promulgate a FIP.

IV. Final Action

Based on a review of SIP submittals received and deemed complete as of the date of signature of this action, the EPA finds that WVDEP has failed to submit a SIP revision by November 22, 2016, addressing the deficiencies identified in the 2015 SSM SIP Call.

V. Statutory and Executive Order Reviews

A. Executive Orders 12866: Regulatory Planning and Executive Order 13563: Improving Regulation and Regulatory Review

⁹ CAA 110(k)(5).

¹⁰ Such highway sanctions would only apply in nonattainment areas. If a state jurisdictional area does not contain any nonattainment areas, then the highway sanctions would not apply in that state.

This action is not a significant regulatory action and was, therefore, not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the provisions of the PRA. This final action does not establish any new information collection requirement apart from what is already required by law. This action relates to the requirement in the CAA for states to submit SIPs in response to findings of substantial inadequacy under section 110(k)(5).

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. The action is a finding that the named air agencies have not made the necessary SIP submission in response to findings of substantial inadequacy under section 110(k)(5) of the CAA.

D. Unfunded Mandates Reform Act of 1995 (UMRA)

This action does not contain any unfunded mandate as described in UMRA 2 U.S.C. 1531-1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments, or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. This action finds that several air agencies have failed to submit SIP revisions in response to findings of substantial inadequacy under section 110(k)(5) of the CAA. No tribe is subject to the

requirement to submit an implementation plan under the findings of inadequacy relevant to this action. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive order. This action is not subject to Executive Order 13045 because it is a finding that several air agencies failed to submit SIP revisions in response to findings of substantial inadequacy under section 110(k)(5) of the CAA and does not directly or disproportionately affect children.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

This final action does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address “disproportionately high and adverse human health or environmental effects” of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” EPA further defines the term fair treatment to mean that “no group of people should bear a disproportionate burden of environmental harms

and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.”

EPA did not perform an EJ analysis and did not consider EJ in this action. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of EO 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

L. Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Filing a petition for reconsideration by the Administrator of this final action does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such action. This action may not be challenged later in proceedings to enforce its requirements (*see* CAA section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Administrative practice and procedures, Air pollution control, Approval and promulgation of implementation plans, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Adam Ortiz,
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